A

K A SANDURAN NEHRU RATNAM

v.

I-BERHAD

B

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
MOHD GHAZALI YUSOFF JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: A02-1076-03]
C 1 DECEMBER 2006

LABOUR LAW: *Industrial Court - Award - Certiorari - Appeal against High Court order - Whether Industrial Court exercised function of criminal court in determining misconduct of employee - Whether*
D *function of Industrial Court to determine only whether misconduct was in fact committed by employee - Whether finding of facts supported by evidence - Whether High Court correct in allowing application for certiorari - Rules of the High Court 1980, O. 53 r. 2(3)*

E ***LABOUR LAW:*** *Industrial Court - Award - Certiorari - Consequential order made remitting case for re-adjudication before another chairman of Industrial Court - Whether High Court could grant relief when it was not prayed for in application - Whether High Court entitled to grant relief pursuant to O. 53 r. 2(3) Rules of the High Court 1980*

F ***ADMINISTRATIVE LAW:*** *Judicial review - Industrial Court award - Certiorari - Consequential order made remitting case for re-adjudication before another chairman of Industrial Court - Whether High Court could grant relief when it was not prayed for in application - Whether High Court entitled to grant relief pursuant to O. 53 r. 2(3) Rules of the High*
G *Court 1980*

The respondent company dismissed the appellant employee for taking 1.5 litres of thinner from the respondent's premises without authorisation. The Industrial Court held that the appellant's
H dismissal was not only without just cause and excuse but also unreasonable, not in good conscience and excessively harsh. The Industrial Court also held that since the appellant was gainfully employed it would be better that there be no order of reinstatement. The Industrial Court consequently ordered the
I respondent to make monetary compensation to the appellant consisting of back wages and compensation *in lieu* of reinstatement. However, the High Court quashed the said award

and ordered that the matter be remitted to the Industrial Court to be dealt with accordingly before a different panel. Hence, the appellant's appeal to the Court of Appeal.

Held (dismissing the appeal and affirming orders of the High Court)
Per Mohd Ghazali Yusoff JCA:

(1) The learned judge adopted the correct approach when he said that what matters was not the type of thinner taken out from the respondent's premises but the taking out of the 1.5 litres of thinner without authorisation. It was not disputed that the thinner was taken out without authorisation. The learned judge was also right when he found that the Industrial Court had committed an error of law in finding that the thinner that was taken out by the appellant was unwanted thinner. Further, the learned chairman had also wrongly taken into consideration that the respondent only suffered a minimal loss as it only involved 1.5 litres of thinner. The value of the thinner taken out of the factory by the appellant was immaterial. What was material was that the thinner was the respondent's property and the appellant was not authorised to take it out of the respondent's premises. (para 27)

(2) The main and only function of the Industrial Court in dealing with a reference under s. 20 of the Industrial Relations Act 1967 is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman. If so, whether such grounds constitute just cause and excuse for the dismissal. The High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence. In the instant appeal, the finding of facts made by the learned chairman could not be supported. Further, the learned chairman introduced technicalities of the court of law instead of going into the substantial merits of the case. In determining the misconduct of the appellant, the Industrial Court proceeded as if it was exercising the function of a criminal court. As such, the appellant could not contend that the High Court had acted as a court of appeal under the circumstances of the instant appeal. From a reading of the learned judge's decision, this court was satisfied that he

A appreciated that judicial review was not an appeal from the decision but a review of the manner in which the decision was made. (para 29)

(3) The learned judge was perfectly correct in ordering that the B matter be remitted for re-adjudication before another chairman of the Industrial Court although this relief was not specifically prayed for in the respondent's application. Pursuant to O. 53 r. 2(3) of the Rules of the High Court 1980, the High Court may make any order upon hearing an application for judicial C review and it shall not be confined to the relief claimed. (paras 30 & 31)

[Case to be remitted to Industrial Court for re-adjudication and conclusion according to law before another chairman. Deposit to be remitted to respondent towards the account of taxed costs.]

D

Bahasa Malaysia *translation of headnotes*

Syarikat responden telah membuang kerja perayu kerana kesalahan mengambil 1.5 liter thinner dari premis responden tanpa kebenaran. E Mahkamah Perusahaan memutuskan bahawa pembuangan kerja bukan sahaja tanpa sebab dan alasan yang adil, tetapi adalah tak munasabah dan merupakan hukuman yang tidak patut dan terlalu berat. Mahkamah Perusahaan juga memutuskan bahawa oleh kerana perayu sudah bekerja, maka tidak perlulah satu perintah F pengambilan semula dibuat. Berikutnya, Mahkamah Perusahaan memerintahkan responden supaya membayar pampasan kepada perayu yang terdiri dari gaji tertunggak dan pampasan sebagai ganti pengambilan semula. Award, bagaimanapun, telah dibatalkan oleh Mahkamah Tinggi sekaligus memerintahkan supaya halperkara G dikembalikan ke Mahkamah Perusahaan untuk dibicarakan di hadapan panel lain. Perayu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dan mengesahkan perintah-perintah Mahkamah Tinggi)
Oleh Mohd Ghazali Yusoff HMR:

H

(1) Yang arif hakim mengambil pendekatan yang betul apabila mengatakan bahawa yang pentingnya bukanlah jenis thinner yang diambil dari premis responden tetapi adalah perbuatan mengambil thinner tanpa kebenaran itu sendiri. Tidak dinafikan I bahawa thinner tersebut diambil tanpa kebenaran. Yang arif

hakim juga betul bilamana mengatakan bahawa Mahkamah Perusahaan telah melakukan kesilapan undang-undang dalam mendapati thinner yang diambil perayu adalah thinner yang tak diperlukan lagi. Selain itu, yang arif pengerusi juga khilaf apabila mengambil perhatian bahawa responden hanya mengalami kerugian minima disebabkan thinner tersebut hanyalah 1.5 liter sahaja. Nilai thinner yang diambil perayu dari kilang adalah tidak penting. Yang penting adalah bahawa thinner tersebut adalah milik responden dan perayu tidak berhak untuk mengambilnya keluar dari premis responden.

(2) Satu-satunya tugas penting Mahkamah Perusahaan dalam menangani rujukan di bawah s. 20 Akta Perhubungan Perusahaan 1967 adalah untuk menentukan sama ada salah laku atau ketakteraturan yang disungutkan oleh syarikat yang menjadi alasan bagi pembuangan kerja telah sebenarnya dilakukan oleh pekerja. Dan, jika begitu, sama ada alasan-alasan tersebut merupakan alasan dan sebab yang adil bagi pembuangan kerja. Mahkamah Tinggi tidak boleh mengganggu dapatan fakta Mahkamah Perusahaan kecuali ia langsung tidak disokong oleh keterangan. Dalam rayuan ini, dapatan fakta yang dibuat oleh yang arif pengerusi memang tidak disokong oleh keterangan. Di samping itu, yang arif pengerusi gagal menimbang merit kes, dan sebaliknya melibatkan diri dengan pertimbangan perkara-perkara teknikal yang menjadi ciri perbicaraan di mahkamah keadilan. Dalam menentukan salah laku perayu, Mahkamah Perusahaan bertindak seolah-olah ia sebuah mahkamah jenayah. Oleh itu, perayu tidak boleh berkata bahawa Mahkamah Tinggi telah bertindak sebagai sebuah mahkamah rayuan dalam keadaan rayuan di sini. Membaca keputusan yang arif hakim, mahkamah ini berpuashati bahawa beliau akur bahawa semakan kehakiman bukanlah rayuan terhadap keputusan, tetapi adalah semakan terhadap cara keputusan itu dicapai.

(3) Yang arif hakim betul dalam memerintahkan supaya halperkara dikembalikan ke Mahkamah Perusahaan untuk pengadilan semula di hadapan seorang pengerusi Mahkamah Perusahaan lain walaupun relif ini tidak dipohon secara khusus oleh responden dalam permohonannya. Berdasarkan A. 53 k. 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980, Mahkamah Tinggi,

dalam mendengar permohonan semakan kehakiman, boleh membuat apa jua perintah dan ianya tidak terhad kepada relif-relif yang dipohon sahaja.

[Kes dikembali ke Mahkamah Perusahaan untuk pengadilan semula dan keputusan menurut undang-undang di hadapan pengerusi lain; deposit dipulang kepada responden ke akaun taxed coststst.]

Case(s) referred to:

Malayawata Steel Bhd v. Mohd Yusof Abu Bakar & Anor [1994] 1 ILR 249 ***(refd)***

Menara Pan Global Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 527 CA ***(refd)***

Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20

Rules of the High Court 1980, O. 53 r. 2(3)

For the appellant - Fathima Idris; M/s Idris & Assoc
For the respondent - TM Varughese; M/s TM Varughese & Co

[Appeal from High Court, Ipoh; Originating Motions No: 25-25-2001]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] The appellant, who was an employee of the respondent, a locally incorporated company, considered that he was dismissed without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s. 20 of the Industrial Relations Act 1967 ("the Act") to be reinstated to his former employment. The representations were subsequently referred to the Industrial Court for an award.

[2] On 30 August 2001, the Industrial Court concluded that the appellant's dismissal was "not only without just cause or excuse, it is also unreasonable, not in good conscience and excessively harsh". The Industrial Court also concluded that since the appellant was now gainfully employed "it would be better that no order of reinstatement is made". The Industrial Court consequently ordered the respondent to make monetary compensation to the appellant consisting of back wages and compensation *in lieu* of reinstatement.

[3] The respondent, upon leave being granted by the High Court, applied for, *inter alia*, the following reliefs:

(i) an order of *certiorari* to quash the award of the Industrial Court dated 30 August 2001; and

(ii) that all necessary and appropriate directions be made.

[4] On 17 November 2003, the learned judge of the High Court allowed the respondent's application with costs and quashed the award and ordered that the matter be remitted to the Industrial Court "to be dealt with accordingly before a different panel". The appellant henceforth appealed to this court.

[5] The facts showed that the respondent manufactured household products such as refrigerators, air conditioners, electric fans and rice cookers. In its Paint Shop section, the employees are involved, among other things, in painting the components of the household products manufactured. For purposes of mixing the paint for painting and also for cleaning spraying equipment, the respondent uses a thinner which is kept in its store. It is the respondent's company work rule that workers are not allowed to take away any property out of the respondent's premises without proper authorization from the management.

[6] The appellant was employed by the respondent since February 1973. At the time of his dismissal on 7 October 1999, the appellant was holding the position of an Assistant Line Captain in the Paint Shop section. His last drawn salary was RM1,439. On 22 September 1999 at about 5.05pm, the appellant, at the end of his shift, was found at the exit point to the respondent's premises carrying out a 1.5 litre bottle containing some liquid by the respondent's security guard. When questioned

as to the contents of the said bottle, the appellant replied that it was battery water. Being dissatisfied with the appellant's answer, the said security guard sought the co-operation of another factory worker as to the contents of the bottle in the appellant's possession. The said factory worker confirmed that the bottle contained "thinner". The security guard then brought the appellant to see the respondent's Human Resources Manager along with the other factory worker.

[7] By letter dated 23 September 1999 the respondent wrote to the appellant as follows:

> Dear Nehru,
>
> It has been reported that on 22.9.99 between the hours of 17.05 to 17.30 you were alleged to have committed the following.
>
> That you had deliberately and knowingly had taken out 1.5 litre of thinner which can be used for paint mixing without authorisation or prior approval, instead for your personal gains and not for any justifiable reason whereby you were caught by the security guard at the exit point.
>
> In view of the seriousness of the misconduct, the Company has decided to suspend you pending inquiry on half pay for the duration of 14 days effective 24.9.99. If the result of the inquiry does not establish a case against you, the Company shall forthwith restore you to the full amount of wages so withheld in accordance with E/A 1955.
>
> During this period of suspension pending inquiry, you will be required to make yourself available to assist the Company in its investigations.
>
> If you wish to be assisted by the Union representative, kindly inform the undersigned 3 days prior to the date of inquiry so that necessary arrangements can be made to allow them to attend the inquiry.
>
> The Company propose to conduct the inquiry into the above mentioned allegation on 6th October 1999 at 9.00am at I-Berhad's downstair conference room.
>
> Please note that if you fail to attend the above mentioned inquiry, the inquiry will proceed *ex-parte*.

Yours faithfully,

(Sign.)

MP Mano - Dy General Manager
Human Resources Department.

[8] The appellant acknowledged receipt of the above letter on the same day. The domestic inquiry was held on 6 October 1999 as scheduled. The charge against the appellant read:

> That you had deliberately and knowingly taken out 1.5 litre of thinner which can be used for paint mixing without authorization or prior approval, for your personal gains and not for any justifiable reason whereby you were caught by the security guard at the exit point.

[9] In the course of the domestic inquiry, the appellant admitted that he had written a letter of declaration ("surat pengakuan") wherein he admitted taking out the bottle of thinner for his own use from the respondent's premises. That letter of declaration, dated 22 September 1999, reads:

> Adalah saya yang bernama seperti di atas dengan ini kata dengan jujur telah melakukan suatu kesilapan dengan membawa keluar 1.5 liter thinner bagi kegunaan sendiri.
>
> Adalah dengan ini juga saya mengaku telah melakukan kesilapan yang tidak sepatutnya saya lakukan mengikut undang-undang syarikat.
>
> Saya berharap pihak syarikat dapat memberi pertimbangan di atas perkara ini kerana ini adalah merupakan kali pertama kesilapan yang telah saya lakukan.

[10] At the end of the day, the panel conducting the domestic inquiry found the appellant guilty of the charge against him and recommended that he be dismissed and that he be given a chance to resign. The respondent consequently decided to dismiss the appellant with effect from 7 October 1999.

[11] In the Industrial Court, the respondent's Chief Executive Officer in his evidence stated as follows:

> I took over the Company in the middle of 1999 following a change in the shareholding of the Company. At the time when I took over the Company was suffering large losses eg, in 1998 the Company made a loss of 5 million, in 1999 when I took over the Company was also in the loss making position. So for 1999

A the Company lost 5 million. One of the things we looked at was why was the Company losing money and the conclusion we came was firstly the material lost was high, secondly the labour productivity was low. So we took steps to improve productivity and to control the material usage. With regards to the materials, when I took over we conducted a stock count. When we compared the physical quantities with the book, there was quite a lot of discrepancies between 3% to 5%. We have RM 15 millions to RM 20 millions of material any one time in the Company. This discrepancy was a big concern. We have the meeting with the staff and the management team to understand the discrepancy and we conclude there were 2 possible reasons - (1) could be fraudulent practices ie, less being delivered to when we made the purchase (2) pilferage of things from the factory (3) wastage could be higher than what we planned. So as a control what we instituted was that at the end of every month, the whole factory stopped production and we did stock count. This was effective from the month of June/July 1999.

In August 1999 we caught one lady operator taking some parts of the fridge without permission. This was a big incident in the Company. The Union got involved in this matter and the Union undertaking that they would inform all the people in the factory that taking the Company's goods is a serious offence.

When this case came before me, I think there were 3 considerations taken in for arriving at my decision. First was that the Claimant was a Union committee member and the Union committee was aware of the seriousness of this offence and the Claimant is a committee member and the fact that it happened one month after the incident of the lady, give me the feeling that no one is paying serious attention to the rules of the Company. The second thing is that the Claimant was 26 years with the Company because the Company motivate the staff to stay with them. For example there is no salary ceiling for the staff hence get an increment yearly. Because the Company motivate them to stay, the Company expects both discipline and co-operation from the staff. The third thing is that although the value of the thinner is small ie, less that RM 10.00 I was relating back to the case of the lady incident, if everyone is doing it, accumulatively the impact on the Company is great as can be seen from our stock discrepancies.

Thinner is one of the component we used in the production process, it is used for mixing the paint.

[12] One Abdul Majid Hassan, who was holding the post of "Production Executive" and who looked after the Paint Shop section stated that the thinner is used for mixing the paint and such work was carried out in the store. The thinner is also used for cleaning the spray gun and the worker's hands. For carrying out such cleaning work, the thinner has to be requested from the store. The thinner, normally amounting to 2 litres or more, will then be poured into a container to be used for such cleaning work. He also stated that the appellant being the worker in charge could request the thinner from the store but it cannot be taken out from the respondent's premises. He confirmed that on 22 September 1999 the appellant never requested his permission to take the thinner out of the respondent's premises. He then explained that overcoats are provided to workers carrying out spraying work and that no worker had ever taken out the thinner from the respondent's premises to clean his shirt.

[13] One Kok Chee Peng, who was working as a supervisor at the Paint Shop section and whose duty was to mix the paint and the thinner testified that the thinner is also used for washing the spray guns and that when one is washing the spray gun, the thinner will get into contact with the hands and hence the hands will simultaneously be cleaned in the process. He also stated that when a worker carry out spraying work, some paint will get on to his body which is not covered by the overcoat. A piece of cloth will then be dipped into the thinner and used to wipe the hands. He disagreed with the suggestion by the appellant's counsel that workers do take the thinner home.

[14] In his evidence the appellant stated that he took the thinner that day because he wanted to clean his shirt which was stained with paint. He admitted that he did not get permission to take the thinner out from the respondent's premises.

[15] In her award, the learned Chairman of the Industrial Court said as follows:

> From the evidence by both parties, it is not in dispute that the Claimant was carrying 1.5 litre of thinner in a bottle when he was questioned by the security guard at the exit point of the Company. It is also not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the Company.

In relation to the charge against the appellant at the domestic inquiry, she said:

> ... the other elements of the charge which have to be considered are whether the thinner was to be used for mixing paint and the Claimant has taken it for personal gains and not for any justifiable reason.

[16] The learned Chairman then went on to find that the evidence adduced by the respondent failed to show that the thinner taken out by appellant can be used for mixing paint. She said the evidence showed that the mixing of paint and the thinner was carried out in the store itself whereas the thinner used for cleaning purposes would be given to supervisors who requested for it and that thinner would be placed in a container. She then found as follows:

> Hence from the evidence given by COW5 it is obvious that 1.5 litre of thinner which the Claimant has with him on that day cannot be the thinner which can used for mixing paint. This is because the thinner to be used for mixing paint is kept in the store and not being taken out since the mixing of the paint and the thinner is done in the store itself.

[17] In coming to the above conclusion, *viz*., that there were two different types of thinner, the learned Chairman referred to the evidence of the appellant; he had testified that the thinner which he took was the "unwanted thinner" which was left at the area where he was doing the dipping process on that day and that the thinner which was left there were used by the workers for cleaning hands, shoes, trousers and shirts. In relation to this the learned Chairman said:

> As for the element that the Claimant has taken it for personal gains and not for any justifiable reason, the Company has not adduced any evidence at all. The Claimant however throughout his testimony and also in the statement of case has stated that the thinner was taken by him for the purpose of cleaning his clothes. This shirt of his was dirtied with black paint. According to the Claimant his clothes was dirtied with paint on that day because when he was doing the dipping of the condensers the paint dripped on his clothes and this clothes was the company's uniform.

Evidence was adduced through COW4 and COW5 that there were workers who used thinner to clean their clothings but they were to do so at their working place. Though that may be so, but in the Claimant's case evidence has been adduced that his clothes was soiled/dirty. Therefore what was stated by the Claimant that his clothes was in a dirty condition which needed to be cleaned and washed at home is reasonable in this circumstance.

The learned Chairman then went on to say as follows:

As mentioned earlier, the Company has failed to show that the thinner was in the possession of the Claimant at that time was the thinner which can be used for mixing with the paint. On this point there was the evidence of the Claimant that he took the thinner which was given by the store to the workers for them to use for the cleaning of the spray guns, hands and clothings. Further the Company has not adduced any evidence that this act of the Claimant enables him to obtain personal gains and not for any justifiable reason. Hence, even though the Claimant has admitted taking out the thinner without authorisation or prior approval, the failure of the Company to establish these two elements put the Company in an unfavourable light in discharging the burden of proof placed on them.

A misconduct which is criminal in nature and in this case it is that of theft/pilferage, it is essential to show the dishonest intention which is either to cause wrongful gain or wrongful loss. In this case it is undeniable that the Company suffered a loss but a minimal one since it involved 1.5 litre of thinner. However the Claimant in his evidence has consistently stated that the thinner which he had taken was for the purpose of cleaning his shirt which has been dirtied by the paint which splashed on it when he was doing the dipping process. This shirt of his was the Company uniform which was supplied to him to be worn when working. Thus the cleaning of this shirt cannot amount to a personal gain. Also since the thinner taken was to be used to clean his shirt, the Claimant thus has a justifiable reason for the act which he has done.

Such being the case, this Court is of the view that the Company before coming to a finding of guilt for any act involving criminal liability the Company has to prove all the elements/ingredients stated in the charge levelled against the employee.

In the event this Court is wrong in finding that the Company has failed to prove the offence alleged against the Claimant, this Court has proceeded to consider whether the nature and extent of the misconduct committed by the Claimant constitutes just cause or

A excuse for the dismissal. The nature and extend of the misconduct has to be looked into for the purpose for determining whether the punishment of dismissal is warranted. This is because dismissal is very serious form of punishment as it affects the livelihood of the employee and those who depend on his solely.

B **[18]** The learned Chairman then found that the appellant acted *bona fide* (in taking the thinner out from the respondent's premises) and that the respondent has failed to give consideration to the appellant's unblemished record of service. She concluded as follows:

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> This Court finds that after having regard to the Company's interests as well as the nature and extent of the alleged misconduct of the Claimant, the Company's act in dismissing the Claimant is not only without just cause or excuse, it is also unreasonable, not in good conscience and excessively harsh.

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[19] She then went on to award a sum of RM17,268 for back wages after making an "adjustment of 40% less" and a sum of RM37,414 as compensation *in lieu* of reinstatement.

E **[20]** The respondent applied to the High Court for judicial review.

[21] The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):

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> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

H

I **[22]** The learned judge also referred to several other authorities and then said:

On the host of authorities aforementioned, it is clear that the Industrial Court is not a court of law where technicalities of the law should be its prime consideration. On the same token, in determining the misconduct of the employee, the Industrial Court should not have proceeded as if it is exercising the function of a criminal court.

On the facts and circumstances of this case, and to quote Abdul Hamid Mohamad JCA in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair (supra)* [2002] 3 CLJ 314 "the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience". The Industrial Court has failed to observe this and on this ground alone, this court is prepared to issue an order of *certiorari* to quash the said decision. The Industrial Court has erred and misdirected itself on the issue of burden of proof and has committed an error of law.

The learned judge went on to say as follows:

As to errors of law, it has always been held that an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law. If an inferior tribunal or other public decision taker does make such error, then he exceeds his jurisdiction. (See: *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 MLJ 317 at page 342). The court of appeal in the said case further said that:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

I am of the view that the Industrial Court has committed an error of law in considering the issue as to the type of thinner that was allegedly taken out by the first respondent. This court is of the view that it is irrelevant for the purpose of the charge against the

A first respondent what the thinner was used for, be it for mixing paint or for the purpose of cleaning. The material issue before the Industrial Court should be the taking out of the thinner without authorization and there is clear evidence to that effect as found by the Industrial Court itself when it held at page 2 of the award that, "it is not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the company".

The learned judge then concluded as follows:

C Upon reviewing the manner in which the decision of the Industrial Court was made, I hold that the decision was flawed by the abovementioned reasons and such a decision must not be allowed to stand. In the circumstances, this application is allowed with costs. I further order that the matter be remitted to the Industrial Court to be dealt with accordingly before a different panel.

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[23] At the appeal before us, learned counsel for the appellant submitted that the learned judge completely overlooked the alternative finding of the Industrial Court that the punishment of dismissal was excessive. He argued that the learned judge has not E given any reasons why he found that differentiating the types of thinner was irrelevant and that an error of law was committed given that the specific reason the respondent themselves have given for dismissing the appellant was that he had taken out thinner that can be used for paint mixing. Counsel insisted that it F is an important distinction to make as the thinner for paint mixing was kept in the store whereas the one for cleaning was kept in the Paint Shop section for the workers to use.

[24] The appellant's counsel then submitted that the learned G Chairman found that the appellant was not dishonest and hence the learned judge is bound to accept such finding. He also argued that the learned judge had erred when he held that the Industrial Court erred and misdirected itself on the issue of burden of proof and thereby committed an error of law. Counsel further insisted H that the learned judge treated this matter in a manner of an appeal and had misappreciated that the learned Chairman had not committed any error of law in the Wednesbury sense.

[25] In opposing the appeal, learned counsel for the respondent pointed out that from the evidence and the pleadings, it is not in I dispute that the appellant was carrying away with him 1.5 litre of thinner which was the respondent's property in a bottle when he

was stopped and questioned by the security guard at the exit point. He consequentially pointed out that it is a rule within the respondent and an implied term in the contract of service that workers shall not take away the respondent's property and with regard to this the appellant had admitted in his evidence in court that he did not ask for permission to take away the thinner. With regards to the dismissal of the appellant, he submitted there was no evidence of any *mala fide* or ulterior motive.

[26] The respondent's counsel consequently argued the Industrial Court should not have proceeded as if it is exercising the function of a criminal court and that the standard of proof applicable is the civil standard, ie, proof on a balance of probabilities and not that of beyond a reasonable doubt. In relation to this he referred to *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314.

[27] We are of the view that the learned judge adopted the correct approach when he said that what matters is not the type of thinner that was taken out, but the taking out of 1.5 litre of thinner without authorization. It is not disputed that the thinner was taken out without authorization. We are also of the view that the learned judge was right when he found that the Industrial Court had committed an error in law in finding that the thinner that was taken by the appellant was not the thinner that was used for the mixing of paint and that it was "unwanted thinner". The evidence clearly showed that the thinner used for mixing paint in the store was the same thinner that was given upon request for cleaning the spray gun and the worker's hands. In relation to this, we noticed that the learned Chairman had also taken into account an irrelevant consideration in arriving at the decision that she made, namely, that the respondent only suffered a loss which is minimal as it involved only 1.5 litre of thinner. We are of the view that the value of the thinner which was taken out of the factory by the appellant is immaterial. What is material is that the thinner was the respondent's property and the appellant was not authorized to take it out of the respondent's premises.

[28] On the whole the learned judge applied the true principal in making the decision that he did, namely, that in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law. In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union (supra)*, which was referred to by the learned judge, this court held that

A an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law and that if an inferior tribunal or other public decision maker does make such an error, then it exceeds its jurisdiction.

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[29] In *Menara Pan Global Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 527 this court has reiterated the principle that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the C misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal and that the High Court will not interfere with finding of facts by the Industrial Court unless the same are D completely unsupported by evidence. In the instant appeal, we find that the finding of facts made by the learned Chairman cannot be supported. Further, she had introduced technicalities of the court of law to the Industrial Court instead of going into the substantial merits of the case. We would agree with the views of E the learned judge that in determining the misconduct of the appellant, the Industrial Court proceeded as if it was exercising the function of a criminal court. As such, we cannot see how it can be contended by the appellant that the High Court had acted as a Court of Appeal under the circumstances of the instant F appeal. From our reading of the learned judge's grounds of decision, we are satisfied that he appreciated that judicial review is not an appeal from the decision but a review of the manner in which the decision is made.

G **[30]** Incidentally, a question which was posed by us at the hearing of this appeal was in relation to the consequential order made by the learned judge, namely, that the matter be remitted to the Industrial Court "to be dealt with accordingly before another panel". It was noted that no such relief was specifically H prayed for by the respondent in its application. In relation to this, both parties volunteered to forward written submissions on this issue and thus we adjourned our decision to a date to be fixed.

[31] With regards to this poser and after perusing the written submission forwarded, we came to the view that the learned judge I was perfectly correct in ordering that the matter be remitted for readjudication before another Chairman of the Industrial Court.

Learned counsel for the respondent argued that having quashed the award, there is nothing more left to be done by the Industrial Court. We do not agree. On this issue, O. 53 r. 2(3) of the Rules of the High Court 1980 read as follows:

> Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Thus, the High Court pursuant to the above order may make any order upon hearing an application for judicial review and it shall not be confined to the relief claimed. The learned judge has deemed it appropriate to remit the matter for readjudication. We find nothing wrong with that decision. It was clearly within his powers and we find that he had exercised that discretion judiciously under the circumstances of this instant appeal. The learned Chairman has committed an error of law through no fault of the appellant and thus it would be in the interest of justice that the matter be readjudicated on the substantial merits of the case. An order for readjudication of the matter would fall within the contemplation of O. 53 r. 2(3). The learned judge has exercised his discretion and we see no reason to disturb it. A similar poser was raised in *Malayawata Steel Bhd v. Mohd Yusof bin Abu Bakar & Anor* [1994] 1 ILR 249. This was how Vincent Ng Kim Khoay J dealt with the issue; he said (at p. 255):

> Now, the resultant question that this Court is faced with, in a situation where the inferior tribunal had failed to consider certain matters which it ought to have considered, is whether the High Court has the power, upon the issuing of an order of *certiorari* to quash the decision, to also consequentially make an order or direction remitting the matter for a rehearing (as in this case) on the substantial merits of the case. Defective decisions are often quashed by *certiorari* without any consequential order of *mandamus* presumably upon the assumption that if its decision is annulled, the deciding authority will recognise that it must begin again. See *Cik Aniza Yaacob & Ors v. Mostek Malaysia Sdn. Bhd. & Ors* [1988] 1 MLJ 451 @ 453.
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> In a case where a *certiorari* order is issued basically on the ground that the inferior tribunal had failed to consider certain matters which it ought to have considered then the cardinal question to be posed is would the tribunal have come to a different decision if it had considered those matters. If one can say with utmost

A certainty that it would have given a different decision then the matter would have ended with just the order of *certiorari*. But in the interest of justice if there is a probability, however marginal it may be, that the tribunal could, even after considering the matters it had earlier omitted to consider, come to the same or similar decision, then the matter ought to be remitted to the tribunal with an order or direction in the nature of a mandamus to compel the tribunal to consider the matter or matters it ought to have considered that is as in our current case the substantial merits of the case. Unfortunately, we do not have any Malaysian decision where this additional power of the High Court has been explored or explained.

[32] We would align ourselves with the views of Vincent Ng Kim Khoay J discussed above.

[33] Under the circumstances in this instant appeal, an error of law was clearly disclosed and hence the learned judge was correct in allowing the respondent's application for *certiorari*. This is certainly a fit and proper case for *certiorari* to be issued and we hereby dismiss the appeal with costs. All orders made by the learned judge are hereby affirmed. This matter is hereby remitted to the Industrial Court for readjudication and conclusion according to law before another Chairman. We would also order that the deposit be remitted to the respondent towards the account of taxed costs.